Supreme Court, U.S.
FILED
OCT 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-459

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

COOPER INDUSTRIES, INC.,
Petitioner,

v.

I.A.M. NATIONAL PENSION FUND
BENEFIT PLAN A, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONER

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October 28, 1986

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REPLY BRIEF FOR THE PETITIONER

I

Respondents are quite wrong when they suggest that the precedent established by the decision below will have only a minimal impact on substantive rights in this or in any other case. To the contrary, the question presented here will be of continuing, vital importance to petitioner and to all other employers who participate in multi-employer pension plans such as that maintained by respondents.

The decision below sanctions the use of judicial process to enforce a *pendente lite* transfer of assets from an

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employer to a pension plan—no matter how substantively illegal the pension plan's withdrawal liability demand may be—and then insulates that enforcement from review on the ground that an employer's "cash flow problems" (Pet. App. A, p. 7a) will never constitute sufficient harm to warrant a preliminary judicial review of the demand's illegality. This follows from the reasoning of the court below: "an order refusing to require interim withdrawal liability payments is appealable because irreparable harm will result; no such harm flows from an order requiring such payments." (Pet. App. A, p. 7a, footnote omitted.)

II

By insulating from review the district court's *sua sponte* order to make interim payments without assessing preliminarily the merits of petitioner's substantial legal defense, the decision below eviscerates 29 U.S.C. §§ 1451 (b) and 1145 and ignores this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982). Taken together, 29 U.S.C. §§ 1451(b) and 1145 state that in any action for interim withdrawal liability payments, the court may require such payments only "to the extent not inconsistent with law." The statute thus mandates judicial inquiry into the lawfulness of interim payments, as this Court has implicitly held in *Kaiser Steel*.

In *Kaiser Steel*, this Court held that "[f]ar from abolishing illegality defenses, § 306(a) [29 U.S.C. § 1145] explicitly requires employers to contribute to pension funds only where doing so would not be 'inconsistent with law.'" *Kaiser Steel*, 455 U.S. at 87-88. Since § 1451(b) requires that a failure to make interim payments be treated "in the same manner" as a delinquent contribution under § 1145, the reasoning of *Kaiser Steel* suggests that an employer must be permitted to raise an illegality defense to an interim payments demand. This the district court refused to allow, and the court below sanctioned that refusal.

The decision below thus prevents employers from ever raising illegality defenses to interim payments demands by inviting pension plans to seek a preliminary injunction through a prayer for relief that contains a label other than "motion for preliminary injunction." [1] At the same time, the decision below permits a pension plan to obtain immediate review of an order denying its request for interim payments—whether the order refuses an injunction or merely has the "practical effect" of doing so—simply by appealing. Thus, a pension plan can always appeal—an employer never can.

III

The court below conceded that an appeal of right will lie from an interlocutory injunctive order entered in response to a specific request. (Pet. App. A, p. 4a n.3), but held that an appeal of right will not lie from an interlocutory injunctive order entered in response to a motion for summary judgment (Pet. App. A, pp. 3a-4a). Respondents seek to reconcile the former with the latter by read-

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[1] Respondents incorrectly suggest that the district court's *sua sponte* order granted their motion for summary judgment and thus effectively entered a permanent injunction. (*See* Brief in Opposition, p. 7.) In an order entered on May 21, 1986, the district court denied respondents' motion for summary judgment and granted summary judgment for petitioner. (Supp. App., *infra*, p. 1a.) The relief ordered earlier by the district court was preliminary to a determination of the merits—not a permanent merits determination. (Pet. App. B, p. 12a-13a.)

Despite the fact that the district court has granted petitioner's motion for summary judgment and dismissed respondents' entire case, this case is not moot because the district court also "ORDERED that the amount deposited by [petitioner] pursuant to the Court's June 25, 1985 order be applied as a credit against the recalculated withdrawal liability," a liability that has yet to be assessed. (Supp. App., *infra*, p. 2a.) Thus, the district court has retained petitioner's first interim payment in the registry of the court—not ordered a refund as respondents suggest. (*See* Brief in Opp., p. 11.)

ing *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), and *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176 (1955), to say that a preliminary injunction entered in response to a specific request always includes a trial court finding of irreparable harm, while an interlocutory injunction entered in response to any other prayer for relief need not do so.[2] That difference, respondents argue, grants an appeal of right to the enjoined party in the first instance, while denying it in the second.

Putting aside the impropriety of an interlocutory injunction even being entered without a showing of irreparable harm, the fallacy in respondents' argument is that the harm to a plaintiff seeking an injunction cannot logically be the reason why an enjoined defendant is allowed to appeal without its own showing of harm on appeal. The reason lies instead in the congressional recognition that a preliminary injunction is a drastic remedy, entered without full consideration, and ought for that reason to be subject to prompt appellate review. The remedy is equally drastic, and equally preliminary, whether or not it has been specifically requested, and the need for appellate review in both instances is equally great.

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[2] Respondents also suggest that petitioner's argument here is a mere "afterthought," made because of its failure to show irreparable harm. (*See* Brief in Opp., p. 4 n.4, 9.) As respondents well know, neither they nor the Pension Benefit Guaranty Corporation challenged the jurisdictional basis for petitioner's appeal until the court below *sua sponte* raised that issue at oral argument. As respondents also know, petitioner strongly asserted at oral argument that it was not required to show irreparable harm to appeal from the district court's injunction under 28 U.S.C. § 1292(a)(1). Petitioner's position is not an afterthought—it is a position consistently maintained since the issue arose.

CONCLUSION

The question presented, though narrow, is one which is occurring frequently. In the multiemployer context, the question will recur because of the way in which the decision below denies substantive rights. Proper judicial administration urges that it be settled by a decision of this Court, thus avoiding repetitive litigation of this procedural question in the lower courts.

The Petition for Certiorari should be granted.

Respectfully submitted,

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October 28, 1986

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3346

I.A.M. NATIONAL PENSION FUND BENEFIT PLAN A, *et al.*,
Plaintiffs

v.

COOPER INDUSTRIES, INC.,
Defendant

[Filed May 21, 1986]

ORDER

Upon consideration of plaintiffs' motion for summary judgment; defendant's cross-motion for summary judgment; additional memoranda, affidavits and exhibits filed by both parties; the Pension Benefit Guaranty Corporation's *amicus curiae* brief; the entire record herein; and for the reasons set forth in the accompanying opinion, it is by the Court this 21st day of May 1986,

ORDERED that defendant's motion for summary judgment is granted; it is further

ORDERED that plaintiffs' motion for summary judgment is denied; it is further

ORDERED that plaintiffs' 29 U.S.C. § 1399(b)(1) notice of liability, dated July 27, 1984, is invalid in its present form; it is further

ORDERED that plaintiffs may send another 29 U.S.C. § 1399(b)(1) notice consistent with the attached opinion; it is further

ORDERED that the amount deposited by defendant pursuant to the Court's June 25, 1985, order be applied as a credit against the recalculated withdrawal liability; and it is further

ORDERED that this case is dismissed.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge